NO. 82-914

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1982

MONSANTO COMPANY,

PETITIONER

v.

SPRAY-RITE SERVICE CORPORATION,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNDERSIGNED SENATORS AND REPRESENTATIVES AS AMICUS CURIAE

Wesley J. Howard
119 D Street, N.E.
Room 407
Washington, D.C. 20510

Attorney for
Congressional Amici

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QUESTION PRESENTED

Whether this Court should reach out to abandon 70 years of established policy that renders resale price maintenance schemes *per se* illegal under section 1 of the Sherman Act, 15 U.S.C. §1.1/

1/The undersigned senators and representatives do not concern themselves in this brief with the Court's resolution of the two primary questions with which the Court is properly faced and for resolutions of which the Court granted certiorari in this case.

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INTEREST OF SENATORS AND REPRESENTATIVES

As members of Congress, the undersigned senators and representatives are concerned that national antitrust policy be set by Congress and not by executive

decision. The Justice Department's amicus curiae petition for certiorari and brief on the merits advocate changes in the law without legislative approval. The members of Congress hereinafter named have a substantial interest in preserving their legislative prerogative to enact new laws and to amend or repeal existing laws.

STATEMENT

This Court granted certiorari in this case on February 28, 1983. 51 U.S.L.W. 3627 (U.S. March 1, 1983) (No. 82-914). In its amicus curiae petition for certiorari,2/ the Department of Justice ("the Department") requested that the Court grant review in this case to reconsider the validity of the 70-year-old rule against resale price maintenance schemes. DOJ amicus petition, pp. 13-18. The Department renewed this request in its brief on the merits.3/ DOJ Brief, 19-29. It is that issue, raised for the first time by the Department's petition, to which this brief is addressed.

SUMMARY OF ARGUMENT

The Department's request that this Court change the per se rule against resale price maintenance reveals a total

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2/Hereinafter referred to as "DOJ amicus petition."

3/Hereinafter referred to as "DOJ Brief."

disregard for the legislative process. First, the Department, as amicus curiae is in no position to raise new issues in this Court that were not raised by the parties either in the lower courts or in this Court. Second, Congress, not the courts, is the proper venue for seeking changes in the law. Further, Congress recently expressed its clear intention to retain the per se rule by the 1975 repeal of the "fair trade" laws that formerly authorized the states to permit resale price maintenance. The Department's attempt to exclude Congress from shaping the Nation's antitrust laws must not be permitted by this Court.

Moreover, the Department simply ignores over forty years of legislative history dealing specifically with resale price maintenance. The Department advocates its narrow view that the achievement of "procompetitive effects" constitutes the sole or primary goal of the

antitrust laws. However, Congress in addressing resale price maintenance issues, has always balanced several diverse and sometimes directly competing goals. Maximization of business freedom, preservation of consumer choice and survival of small business are among the factors balanced by Congress throughout the lengthy legislative history involving vertical price-fixing. The suggestion that resale price maintenance may be justified simply on the basis of alleged "procompetitive effects" which may or may not result from a manufacturer's self-interest is totally unsupported by legislative history or this Court's decisions.

ARGUMENT

I. The Department, as Amicus, Improperly Seeks to Have the Court Reach the Question of the Legal Standard Applicable To Resale Price Maintenance

The Department argues that the Court should reach out to change the per se rule against resale price maintenance, even though this question was not raised by either of the parties in the lower courts or in this Court. The Department, as amicus curiae, is not in a proper position to raise new issues in this Court. Bell v. Wolfish, 441 U.S. 520, 531, n. 13 (1979); Knetsch v. United States, 364 U.S. 361, 370 (1960). In fact, the Department is well aware of this principle, having argued in another context against just such an attempt by amicus curiae:

> "But an amicus curiae is not a party to the suit, has no control over it, and must accept the case before the court as it has been framed by the parties. Amicus curiae may not introduce new issues nor resurrect issues abandoned by the parties." Brief for the United States in McCalpin v. Masson, No. 82-2318, United States Court of Appeals for the District of Columbia Circuit, p. 41-42.

The Department should not be able to pick and choose as to when it believes that established principles of law should apply. This Court, therefore, should not address the proffered question raised for the first time by the Department's amicus brief.

II. Legislative History Clearly Demonstrates Congressional Intent to Retain the Per Se Rule Against Resale Price Maintenance

A. This Court has Previously Acknowledged That the Passage of the Consumer Goods Pricing Act of 1975 Reestablished the Per Se Illegality of Resale Price Maintenance

The Department in its amicus curiae petition urged this Court to "grant review in this case to consider whether all vertical restraints, including resale price maintenance, should be analyzed under the rule of reason." DOJ amicus petition, p. 13 (emphasis in original). However, the proper forum for seeking change in the law is Congress,

not the courts. The issue of legislative prerogative presented by the Department's petition and brief is not a new one. As recently as June 18, 1982, this Court addressed itself to the very issue now argued by the Department. In unequivocal language, this Court reasserted the congressional prerogative in connection with maximum price fixing. The members of Congress named herein assert their legislative prerogative in connection with the per se rule against resale price maintenance.

In the earlier case, the Court stated,

> "Our adherence to the per se rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and Congress in regulating the economy. . . .Given its generality, our enforcement of the Sherman Act has required the Court to provide much of its substantive content. By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the

> legislative prerogative to amend the law. The respondents' arguments against application of the per se rules in this case therefore are better directed to the legislature." Arizona v. Maricopa County Medical Society, 102 S. Ct. 2466, 2478-79 (1982). (Emphasis added).

Both resale price maintenance and maximum price fixing have been firmly established as clear antitrust violations. Therefore, this Court should resist the Department's attempt to skirt the legislative process.

Moreover, the Department's attempt to evade this congressional prerogative to amend the law has aroused a strong reaction by the House Judiciary Committee. The Committee's recent approval of the Department of Justice Authorization bill, H.R. 2912, contained a provision which states that no funds appropriated shall be used to

> "overturn or alter the per se prohibition of resale price maintenance, in effect under the Federal antitrust laws." H.R. 2912, Section 14, as reported out of the House Judiciary Committee, May 16, 1983.

The House Judiciary Committee's report on this measure expressed the Committee's serious concern with the Department's actions in the instant case:

> "The Division's amicus intervention in Monsanto Co. v. Spray-Rite Service Corp., No. 82-914 (1983), is particularly disturbing. . . .At the very least, this expansive use of certiorari to accomplish a sweeping revision of the law relating the (sic) RPM indicates an insensitivity to the respective roles of the Congress and the Judiciary in the formulation and application of antitrust policy. More seriously, the Department's conduct in this private matter may prove to be a wholly unjustified allocation of resources in a bold attempt to circumvent the Congress." H.R. 98-181, 98th Cong., Ist Sess. (1983), p. 22 (Emphasis added).

There can be no doubt about the congressional intent regarding resale price maintenance. In 1975, Congress repealed "fair trade" laws that formerly authorized the states to permit resale price maintenance. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, § 2, 89 Stat. 801. This Court has already indicated

in dicta that such repeal represented legislative ratification of the per se rule for vertical price fixing arrangements.

> ". . .Congress recently has expressed its approval of a per se analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair trade pricing at the option of the individual States. Consumer Goods Pricing Act of 1975, 89 Stat. 801, amending 15 U. S. C. §§ 1, 45(a). No similar expression of congressional intent exists for non-price restrictions." Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51 n. 18 (1977).

This Court has thus limited its broad mandate to interpret the Sherman Act where there is an "expression of congressional intent" on a particular practice. While the Department cites cases that state the existence of this Court's broad power in other contexts, it cites no authority contrary to the proposition that when Congress has spoken, this Court will allow Congress the "legislative prerogative" to amend the law.

Moreover, the legislative history of the 1975 Act provides extensive evidence to support the Court's conclusion that Congress adopted the per se rule prohibiting vertical price fixing. The Senate and House reports as well as floor debate reflect Congress' clear understanding and intention that repealing "fair trade" meant reinstituting the per se rule against resale price maintenance. The House report specifically noted that in the absence of the fair trade exemptions,

> "An agreement between a manufacturer and a retailer that the retailer will not resell the manufacturer's product below a specified price is an abvious (sic) form of price fixing. As such it is per se illegal under section 1 of the Sherman Act." H. R. Rep. No. 94-341, 94th Cong., 1st Sess. 2 (1975).

Rep. Rodino, a co-sponsor of the bill and Chairman of the House Judiciary Committee and its Subcommittee on Monopoly

and Commercial Law which reported the bill to the House, said in floor debate that:

> "They (the fair trade laws) have aged to the point where they preserve classic restraints of trade, which but for the protective umbrella they provide, would be considered per se violations of the antitrust laws." 121 Cong. Rec. 23659 (1975).

Rep. Seiberling, also a co-sponsor, agreed, adding that the fair trade laws protected practices that "otherwise would have amounted to a per se violation of the Federal antitrust laws." 121 Cong. Rec. 23662 (1975). Rep. Jordan, another co-sponsor, joined the chorus, stating that:

> "Together, (the fair trade laws) constituted special interest legislation that legitimized what, without the exemption granted by those acts, would be per se violations of the antitrust laws." 121 Cong. Rec. 23659 (1975).

B. Congress' Reestablishment of the Per Se Rule Against Resale Price Maintenance Revealed a Full Understanding of the Reasons for its Action

The Department concedes that the Consumer Goods Pricing Act of 1975 re-established the per se rule:

> "Both the House and Senate reports on the 1975 legislation indicate Congress' awareness that by repealing the Fair Trade laws, they were remitting resale price maintenance to Dr. Miles' per se ban." DOJ Brief, p. 28, n. 40.

The Department, however, seeks to evade this conceded point by arguing that nothing in the legislative history suggests that Congress intended to "freeze" the practice into the per se category. DOJ Brief, supra. To the contrary, the statements surrounding repeal of fair trade illustrate the fact that Congress was not merely mouthing mechanical phrases about per se illegality. Congress repealed fair trade and reestablished the per se rule precisely because of its understanding of the pernicious effect of the practice on our economy. Similarly, if evidence were presented to Congress which

showed that "new learning" revealed positive effects of resale price maintenance that negate its pernicious effects, Congress could change the per se rule in the future. Finally, there have been no actions by Congress since the passage of the 1975 repeal legislation that suggest that this clear expression of intent to retain the per se rule has been weakened over time.

In addition to the numerous specific references to the per se rule, legislative history shows Congress' full understanding and acceptance of the rule in operation. The per se rule is based on the premise that

> "(T)here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the

ousiness excuse for their use." Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958).4/

In repealing the fair trade laws, Congress clearly reflected such an assessment of the "pernicious effect" of resale price maintenance. The Senate report stated flatly that

> "Without these exemptions the agreements they authorize would violate the antitrust laws," and that "(fair trade laws) are, in fact, legalized price-fixing." S. Rep. No. 94-466, 94th Cong., 1st Sess. 1 (1975).

4/Thus, the per se rule, which means automatic liability once the fact that the practice has been engaged in has been shown, must be contrasted with the "rule of reason," which requires elaborate analysis to determine

> ". . .whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the Court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to (footnote con't)

The House report on the repeal legislation sounded the same theme:

> "Fair trade laws are nothing more than legalized price fixing." H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 5 (1975).

Further, Senator Brooke, the main sponsor in the Senate emphasized that

> "Without these Federal statutes (the fair trade laws), these interstate price-fixing conspiracies would be in violation of the most basic of our antitrust laws--the Sherman Antitrust Act and the Federal Trade Commission Act." 121 Cong. Rec. 38049-50 (1975).

Senator Philip Hart, the Chairman of the Antitrust Subcommittee of the Judiciary Committee, noted that

> "Without fair trade, retailers can charge any price they desire." 121 Cong. Rec. 37557 (1975).

(footnote con't)exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

Senator Hruska, the Ranking Minority Member of the Judiciary Committee -- who chaired 3 of the 7 days of Subcommittee hearings on the legislation -- added that

> "(S)uch laws (fair trade) allow a manufacturer to enter into an agreement with a retailer to set minimum prices at which his identifiable product may be sold--hence legalizing price-fixing." 121 Cong. Rec. 38051 (1975).

In the House, Rep. Hutchinson noted that

> "Upon enactment of this bill it would be a violation of the Federal Antitrust Act for a manufacturer to set a minimum retail price for any item he makes; that would be price fixing." 121 Cong. Rec. 23660 (1975).

Rep. McClory joined the chorus:

> "The enactment of H.R. 6971 would repeal these Federal exemptions and thus invalidate State fair trade laws and the contractual provisions supported by such state laws. 121 Cong. Rec. 23660 (1975). (Emphasis added)

Finally, Rep. Van Deerlin -- the Chairman of the Subcommittee on Consumer Protection and Finance -- added that

> "Without this helping hand from Washington, such price fixing would be illegal under the antitrust laws." 121 Cong. Rec. 23661 (1975).

The Department seeks to escape the force of this clear legislative history by citing the proposition that:

> "(T)he views of some legislators in 1975 concerning the competitive effects of resale price maintenance (do not) offer much assistance in discerning the meaning of a statute enacted 85 years previously." DOJ Brief, p. 28 (footnote omitted).

This statement would be relevant if the intent of the framers of the Sherman Act were in issue. However, the legislative history of the Consumer Goods Pricing Act of 1975 is not being offered as evidence of what the Sherman Act meant in 1890. Rather the history shows what

Congress meant when it most recently acted in passing legislation dealing with resale price maintenance.5/

5/Furthermore, the Department cannot seriously question whether the views of "some" legislators represent the views of Congress as a whole, because the Department concedes on the same page of its brief Congress' "awareness" of its action. DOJ Brief, p. 23, n. 40.

The Department properly admits that "Congress' views about resale price maintenance--and Dr. Miles--have varied over the years." DOJ Brief, p. 28, n. 41. That is why it is the most recent legislative act that is most illustrative of Congress' intent. The fact of varying views on the subject over the years also reinforces the principle that Congress, not the Court, should establish antitrust policy in this area.

In GTE Sylvania, supra, this Court correctly recognized that the passage of the Consumer Goods Pricing Act of 1975 showed Congress' intent to reinstate the per se rule. Given this intent and Congress' active role in shaping resale price maintenance policy over the years, this Court should defer to Congress' intent to retain the per se rule against vertical price fixing.

III. Congressional Consideration of Resale Price Maintenance Has Always Involved a Combination of Broad "Competition" Concerns as Well as Social and Political Concerns

The Department argues that the Court should abandon the per se rule on the theory that

> "(D)isparate treatment of non-price vertical restraints and resale price maintenance makes little sense from the standpoint of antitrust policy, because resale price maintenance in some situations can have procompetitive or neutral effects." Department's amicus petition, p. 14. See also, DOJ Brief, p. 27.

The "procompetitive" effects to which the Department refers stem from the Department's narrow view of "competition" as being whatever the manufacturer thinks is best. As the Department states it,

> "It is our judgment that manufacturers of certain types of products often have legitimate reasons for wishing to control the distribution environment,"

and that if the manufacturer fails to control the distributor,

> "(T)he manufacturer's mis-

> take will be punished in the marketplace. Government interference is not needed." Letter, Assistant Attorney General William F. Baxter to Senator Howard M. Metzenbaum, on resale price maintenance, Oct. 5, 1982 at 4.

This argument is illustrative of the Department's repeated attempts to ignore the bases upon which Congress sets its policy regarding resale price maintenance. However, in framing the issue in its brief, the Department reveals the basic flaw in its narrowly conceived viewpoint:

> "Accordingly, a per se rule against resale price maintenance can be justified only if there is some persuasive basis for supposing that the practice reduces output, retards innovation, or, otherwise interferes with Sherman Act goals." DOJ Brief at 21 (Emphasis added). 6/

6/ Congress has acted on the subject of resale price maintenance three times since the original 1890 Sherman Act legislation was passed. Miller-Tydings Act, 50 Stat. 693 (1937) (establishing "fair trade" authorization); McGuire Act, 66 Stat. 631 (1952) (expanding fair trade); Consumer Goods Pricing Act, 89 Stat. 801 (1975) (footnote cont.)

Thus, the Department concedes that a per se rule may be justified if it supports "Sherman Act goals." It is Congress, however, not the Department which sets these goals.

The legislative history of the various actions taken by Congress shows that Congress has considered a wide range of factors in setting resale price maintenance policy. Nowhere in the legislative history is there evidence for the Department's proposition that a manufacturer's view of how to distribute its products is the be-all and end-all of what Congress means by "competition." Rather, the legislative history leads to two totally different conclusions.

First, Congress' idea of competition includes freedom of all participants in the

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(footnote cont.) (repealing fair trade). Therefore, the "Sherman Act goals" referred to by the Department may be inferred from the intent of Congress in its most recent enactment involving resale price maintenance.

distribution process--not simply manufacturers--to react to competitive conditions at their own level of distribution. Competition also includes the freedom of consumers to choose from as wide a variety of products and seller styles as is possible.

Second, Congress has been concerned with maintaining an economic structure that represents a cross-section of the American business system. That is, Congress has expressed its desire to encourage the continued existence of small and medium sized businesses for social and political reasons, even if such a desire is not always coterminous with a manufacturer's self-interest.

A. Congress' Notion of "Competition" Includes More Than a Manufacturer's Self-Interest

Congress has not accepted the Department's narrow view of how the marketplace should work. When it repealed the fair trade laws in 1975, Congress noted other

procompetitive values that would be stifled if manufacturers could dictate resale prices. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, §. 2, 89 Stat. 101. In Congress' view, competition means retail competition as well:

> "Some retailers prefer to try to enlarge their share of the market by competing vigorously in price--prescisely (sic) the sort of behavior encouraged by our antitrust laws. This competition is stifled by 'fair trading'. " H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 3 (1975).

In addition, Congress has always been concerned with the value of competition to the ultimate beneficiaries, the consumer:

> "To the extent that the 'Mom and Pop' retailer charges a higher price because he is providing more services to his customers, consumers should have the freedom to choose between paying more for these services and buying nothing but the unadorned product at a lower price from a competitor." H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 4 (1975).

As Senator Brooke of Massachusetts--the prime Senate sponsor of the fair trade repeal bill--stated on the Senate floor:

> "I believe, just as our forefathers believed, that the only means to insure the American consumer a fair deal is to insure that competition, not conspiracy, dominates the retail market. Competition forces retailers, wholesalers, and manufacturers to provide the consumer the most for her or his money. We cannot on the one hand celebrate the beauties of free competition and then squelch it at the moment it benefits the consumers." 121 Cong. Rec. 38051 (1975) (Emphasis added).

This Court should reject the Department's attempt to squeeze the purpose of the prohibition against resale price maintenance into the small box of "manufacturer knows best." A judgment of the competitive effects of a practice -- according to Congress -- requires a balancing of the effects on manufacturers, retailers and consumers.

B. Congress Has Repeatedly Expressed the View That Resale Price Maintenance

Policy Must Consider More Than Economic Factors.

The Department's argument for a narrow view of what the antitrust laws are meant to accomplish ignores what Congress has said and done about resale price maintenance. Congress has been and continues to be concerned with more than simply the views of one school of economics. Congress allowed the states to permit resale price maintenance for a time in order to protect the existence of the small business component of our economic structure. See, e.g., H.R. Rep. No. 1437, 82d Cong., 2d Sess. 2,4 (1952); S. Rep. No. 2053, 74th Cong., 2d Sess. 2 (1937). When Congress repealed fair trade, it did so not because it no longer was concerned with the existence of small business, but because resale price maintenance was an ineffective means to accomplish this socio-political goal. S. Rep. No. 94-466, 94th Cong., 1st Sess. 3 (1975).

When Congress in 1952 expanded the power of the states to allow fair trade, it was well aware of the economic arguments for and against the practice. 7/ It based its decision, however, on other factors:

> "The committee has studied diligently the economic arguments for and against fair trade...However, the committee is ever mindful of the effects on our economic and political institutions that would result from the wholesale destruction of small business concerns.

7/ Congress passed the first of two "fair trade" laws in 1937 with the Miller-Tydings Act, which allowed the states to permit resale price maintenance agreements. Ch. 690, Title VIII, 50 Stat. 693 (1937) (repealed in 1975). In response to this Court's decision in Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384 (1951) (Miller-Tydings Act construed as not authorizing nonsigner provision), Congress in 1952 enacted the McGuire Act, broadening the States' power to allow enforcement of resale price maintenance contracts even against buyers who refused to sign such agreements. Ch. 745, § 2, 66 Stat. 632 (1952) (repealed 1975).

"In this connection, the committee was greatly interested in the testimony of the Federal Trade Commission...the Commission witness, however, was frank enough to state that there were grounds other than economic and legal grounds which might be considered as furnishing valid arguments in favor of federal validation of state fair trade legislation.

First, the Commission witness stated, the maintenance of a strong healthy small-business community is the best bulwark that we have against the growth of collectivism either in the form of fascism or communism. Secondly, the witness' own studies showed that in those communities in which there exists a healthy small-business group, the level of civic welfare and the interest taken by small-business leaders in health, recreation and education tend to be higher than in those communities in which business consists principally of a few concerns owned and operated by distant corporations...

Under all these circumstances, the committee feels amply justified in recommending enactment of H.R. 5767..." H.R. Rep. No. 1437, 82d Cong., 2d Sess. 4-5

(1952) (Emphasis added). 8/

When it determined that resale price maintenance was no longer in the public interest, Congress did not decide that non-economic factors were no longer relevant. Rather, it repealed fair trade because over 30 years of evidence showed that the experiment had failed. For example, the Senate report pointed our that:

> "The traditional argument that fair trade protects the 'Mom and Pop' store from unfair competition is not borne out by statistics. Between 1956 and 1972 the rate of growth of small retail stores in free trade States (including states which repealed 'fair trade' during this period) is 32 percent higher than the rate in 'fair trade' States." S. Rep. No. 94-466, 94th Cong., 1st Sess. (1975).

The very fact that both the Senate

8/ The Senate report on the McGuire Act made no recommendation on the legislation, so there are no corresponding Senate views. S. Rep. No. 1741, 82d Cong., 2d Sess. 1 (1952).

and the House reports on the repeal legislation went to great pains to explain why fair trade was not useful in protecting the small business structure of our economy shows the deep level of concern Congress had with this factor. Thus, repeal of fair trade was not a rejection of the validity of considering noneconomic effects as part of the antitrust policy decision-making process. Rather, it was a rejection of an antitrust exemption for vertical price-fixing as an effective means to accomplish the political objective of keeping a vigorous and healthy small business sector in our economy. The Court should uphold this congressional policy and reject the Department's attempt to exclude noneconomic factors from antitrust analysis.

CONCLUSION

The Department clearly misdirects its request for a change in the law of resale price maintenance to this Court. The overwhelming body of legislative history shows Congress' intent to keep the per se rule in operation as well as its concern with policy matters far beyond the myopic "manufacturer knows best" view urged by the Department. Therefore, this Court should resist the Department's attempt to exclude Congress from the process of shaping the Nation's antitrust laws, and retain the per se rule against resale price maintenance. The Department's suggested change in the law, if there is to be one, should be made at the legislative level.

Respectfully submitted,

Senators	Representatives
Howard M. Metzenbaum	Don Edwards
Jeff Bingaman	Ben Erdreich
Paula Hawkins	Barney Frank

Edward M. Kennedy

Patrick J. Leahy

William Proxmire

Donald W. Riegle, Jr.

Warren Rudman

Lowell P. Weicker, Jr.

William J. Hughes

Albert Gore

Jim Moody

Donald J. Pease

Charles E. Schumer

John Seiberling

Louis Stokes

Wesley J. Howard
Attorney for
Congressional Amici

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